IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation,
Petitioner,

vs.

GERTRUDE MOONEY, Administratrix of the Estate of Neil P. Mooney, Deceased,
Respondent.

No. 1367

125

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI
and
BRIEF IN SUPPORT THEREOF.

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IN THE

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TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation, Petitioner, vs. GERTRUDE MOONEY, Administratrix of the Estate of Neil P. Mooney, Deceased, Respondent.	No.....

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Missouri.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Terminal Railroad Association of St. Louis, a corporation, and respectfully petitions this Honorable Court to grant and to issue its writ of certiorari directed to the Supreme Court of Missouri (hereinafter referred to for convenience as the Court below), directing it to send to this Court for review its original opinion rendered March 5, 1945, by Division Two thereof, in this cause lately there pending, styled Gertrude Mooney, Administratrix of the Estate of Neil P. Mooney, Deceased, respondent,

v. Terminal Railroad Association of St. Louis, a corporation, appellant, No. 39,202 on the docket of the Court below, affirming a judgment of the Circuit Court of the City of St. Louis, Missouri, in said cause, in favor of respondent and against your petitioner herein.

Your petitioner further states that it timely presented to the Court below and filed therein, its motion for a rehearing of said cause or in the alternative to transfer said cause to the Supreme Court of Missouri, en banc; which said motion for a rehearing or to transfer to court en banc was by the Court below overruled on April 2, 1945, in said cause.

OPINION OF THE COURT BELOW.

The opinion of the Court below, which is by this petition sought to be reviewed, appears on pages ... to ..., inclusive, of the printed transcript of the record filed herein. That opinion has not yet been published in the official reports of the Supreme Court of Missouri, but appears in 186 S. W. (2d) 450. The second opinion, part of which is adopted by reference thereto in the present opinion, is published in 176 S. W. (2d) 605.

JURISDICTION OF THIS COURT.

The action here sought to be reviewed was brought under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65). The jurisdiction of this Court is based upon Section 237 of the Judicial Code as amended by the Act of February 13, 1925, Chap. 229, 43 Stat. 937, Title 28, U. S. C. A., Sec. 344 (b), providing for review in this Court by certiorari of decisions of the highest courts of the several states

where any title, right, privilege or immunity is specially set up or claimed under a statute of the United States.

Brady v. Southern R. Co., 320 U. S. 476, 479, 88 L. Ed. 239, 242;
Bailey v. Central Vermont Ry., 319 U. S. 350, 87 L. Ed. 14, 44;
Steeley v. Kurn et al., 313 U. S. 545, 61 S. Ct. 1087, 85 L. Ed. 1512;
Seago, Admrx., v. N. Y. Cent. R. Co., 315 U. S. 781.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This action was commenced and has been maintained by respondent under the Federal Employers' Liability Act (hereinafter called the Act), 45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65, to recover from petitioner damages for the death of Neil P. Mooney, her husband, for the benefit of herself and her minor children.

Decedent was killed in the course of a switching movement in the City of St. Louis, Missouri, on November 28, 1939, when he stepped directly in front of a moving locomotive. At the time of his death Mooney was 30 years of age, his wife, respondent, was about the same age, and the two children were 4 years old and 5 months old, respectively.

Although respondent pleads nine separate acts of negligence against petitioner, she went to the jury upon but one of them, viz., the charge found in paragraph (7) that

> "defendant, by and through its engineer and the fireman, in charge of and operating said switch engine, saw or by the exercise of ordinary care could have seen the deceased walking toward and crossing said horn track in a position of imminent peril and likely to be struck by said engine and oblivious to his danger, in time thereafter for the defendant by and

through its agents and servants, with safety to said engine and the persons in charge thereof and riding the same, by the exercise of ordinary care, to have stopped the said engine, checked its speed or given timely and adequate warning to the deceased of its approach and thereby have avoided striking, injuring and killing the deceased, but negligently failed to do so" (R. 6, 7).

Petitioner answered with a denial of every allegation in respondent's petition.

Respondent's petition was in two counts, the first to recover Fifteen Thousand Dollars ($15,000.00) for decedent's conscious pain and suffering between his injury and his death; and the second to recover the sum of Ninety-five Thousand Dollars ($95,000.00) for the pecuniary loss sustained by respondent and her two minor children.

Judgment was rendered in her favor in the sum of Ten Thousand Dollars ($10,000.00) upon the first count and Forty-five Thousand Dollars ($45,000.00) upon the second count. Thereafter, and preceding the appeal to the Supreme Court of Missouri, respondent, in obedience to the order of the trial court, remitted Ten Thousand Dollars from the amount of the verdict rendered on count two of her petition, leaving the amount of the judgment Forty-five Thousand Dollars ($45,000.00).

Respondent was killed in the course of making a "flying switch," or in railroad vernacular, "dropping a car." The locomotive was headed west and coupled to its head end was a freight car (R. 19). The locomotive and the car had gone to a point about one hundred feet west of where the switch foreman was standing, and had stopped (R. 19). Decedent had ridden the front end of the car past the point where the switch foreman was standing, had got off (R. 20) and then had walked back to the switch foreman (R. 21).

The switch foreman then explained to decedent the movement which was to be made and told him just how the engine and car would move (R. 22); and warned decedent to look out for the locomotive (R. 46).

There appears opposite page 12 of the record a photograph made with the camera pointed toward the east, the direction in which the switching movement was to be made. It will be noticed that near the center of the photograph there is a large figure 4 which indicates track No. 4. This track curves towards the right and connects with a straight track upon which and just beyond the switch point is shown a box car. Between the red figure 4 and the box car, and closer to the box car, is a track which leads to the left of No. 4 and connects with track No. 5, which lies north of No. 4. The short track connecting tracks Nos. 4 and 5 is spoken of by the witnesses as the "cross-over."

While the switch foreman and decedent were standing at the switchstand the foreman told decedent that the engine would come down on track 4, that he would then throw the switch near which they were standing and permit the engine to pass through the cross-over between tracks 4 and 5, and the car would continue on track 4 (R. 22). At that time the foreman warned decedent to look out for the engine coming through the cross-over. He explained the intended movement to decedent not once but three times. Thereupon decedent told the foreman "All right" (R. 46). During the same conversation the foreman told decedent that it would be the latter's duty to block the car which was to continue east on No. 4, to prevent it from rolling back towards the west and fouling the switch point (R. 46, 54). At the end of the conversation decedent walked north across track No. 5, then east in a half-circle back towards No. 5 (R. 22). Decedent was proceeding in the

proper direction even though he walked north across track No. 5, as he would not be expected to step over the cross-over which would put him directly in the path of the locomotive (R. 51).

After the foreman had warned decedent and had informed him of the moves to be made, the operation was commenced by the foreman's giving the engineer the signal to make the flying switch. This signal was obeyed and the engine and car were started (R. 24, 60). The next step in the operation was for the switch foreman to, and he did, signal the engineer to check the speed to permit a switchman to uncouple the car from the locomotive (R. 35). The uncoupling was made (R. 36), and about that time the foreman looked towards decedent who then had turned towards No. 5 track (R. 36). The foreman then realized that unless decedent changed direction he might be struck by the locomotive on the crossover track (R. 25). Thereafter the foreman disregarded everything else and endeavored to warn both decedent and the engineer by shouting and giving signals (R. 25, 38). He was unable to attract the attention of either (R. 39, 85, 86).

Decedent continued to walk towards the cross-over and stepped "directly in front of the locomotive tender"; "he walked to that north rail and stepped over that rail just as the engine hit him"; "he stepped across that rail; that is when the engine hit him; couldn't be much closer" (R. 45).

The engineer testified that he did not see decedent after the latter was talking to the switch foreman before the movement commenced (R. 58). Decedent had no part to play in the actual switching movement that was about to take place (R. 47, 48), and, so far as the engineer was concerned, was of no importance in the operation (R. 81). The engineer's attention was directed towards the switch foreman for signals and the other switchman, whose duty it

was to uncouple the cars (R. 81). During this movement the engineer was looking alternately east and west, towards Luthy, the switch foreman, and towards the car he was pulling away from (R. 62, 65). At no time prior to decedent's injury did the engineer see any stop signal being given by the switch foreman (R. 86), but he stopped the engine as soon as possible after he saw the switch foreman's emergency stop signal (R. 85). By that time, however, the accident had already occurred.

During the whole course of this operation the locomotive bell was ringing (R. 44, 80).

Respondent's theory of recovery is based upon what is commonly called in Missouri the "humanitarian doctrine." The principles of that doctrine have been laid down by the Missouri Supreme Court in Banks v. Morris, 302 Mo. 254, 267, 257 S. W. 482. The five requisites for the application of that doctrine as laid down in the Banks case are:

(1) That plaintiff was in a position of peril;

(2) That defendant had notice (actual or constructive) of such peril;

(3) That defendant could have stopped or warned or in some other manner have avoided striking plaintiff or decedent;

(4) That defendant negligently failed to do so; and

(5) That the injury proximately resulted from such failure.

Petitioner's position is that if it be possible for respondent to recover notwithstanding decedent's negligence, she must base her case on the last clear chance doctrine as interpreted and applied by the federal courts, rather

than the Missouri humanitarian doctrine. As petitioner reads the decisions, the last clear chance doctrine does not permit recovery unless plaintiff's or decedent's negligence had stopped prior to the casualty, and unless he was actually seen in a position of peril by the defendant. The Missouri humanitarian doctrine does not require proof of either of these elements, and for that reason is much broader than the last clear chance doctrine.

Petitioner's further position on this issue is that this case is not controlled by that doctrine, but if it were, respondent has failed to make a case under that doctrine.

QUESTIONS PRESENTED.

I.

What becomes of uniformity of right and remedy if recovery in this case may be had in a state court of Missouri under the Missouri humanitarian doctrine which requires appreciably less proof to create liability than does the last clear chance doctrine, whereas if the case were brought in any other state's courts, or even in any federal court in Missouri, recovery would be denied for failure of the proof to make a case under the last clear chance doctrine?

II.

Do the provisions of the Federal Employers' Liability Act destroy the last clear chance doctrine as a ground for recovery in cases to which that act is applicable?

III.

In an action brought under the Federal Employers' Liability Act, may recovery be had under the Missouri humanitarian doctrine which no federal court (or any state court other than those of Missouri) has ever accepted or applied, and which requires no proof of either the termination of plaintiff's negligence prior to injury, or actual rather than constructive notice of his peril on the part of defendant?

IV.

Do the facts here make a submissible case under the last clear chance doctrine as it is interpreted and applied by the federal courts?

V.

Does the evidence show that decedent's own negligence was the sole proximate cause of his death?

VI.

Is a plaintiff bound by the testimony of his own witnesses where it is not contradicted, not contrary to the physical facts or challenged in any other manner? Or may he after proving certain facts and in the absence of any contradicting evidence, base his right to recover upon the theory that his own witnesses have testified falsely and the jury should therefore find the facts to be just contrary to his own evidence?

VII.

May plaintiff's counsel make a viciously unfair and highly prejudicial argument to the jury without committing reversible error?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

I.

If the opinion of the Court below is permitted to stand, then there is no uniformity of right or remedy under the Act. As one of the principal reasons for the passage of the Act was to secure such uniformity, the intent of Congress is completely frustrated if a plaintiff may recover upon one theory in one state, and another theory in another state, and possibly various other theories in several other states, depending upon the interpretations of the rule by the state courts.

The Missouri humanitarian doctrine is peculiar to Missouri. So far as petitioner has been able to ascertain, no court outside of Missouri recognizes it. The federal courts have never recognized it in the slightest degree, but have adhered to the last clear chance doctrine. The Court below has affirmed respondent's judgment recovered upon the Missouri humanitarian theory. Therefore, we have this situation: In the city of St. Louis the Federal Building is directly opposite the state Civil Courts Building. If plaintiff files his action in the Civil Courts Building on the north side of Market Street, he may recover under the Missouri humanitarian doctrine. On the other hand, if he files his action in the United States District Court on the south side of Market Street he cannot recover under the Missouri humanitarian doctrine. If he files his action in either a state court or a federal court in Illinois, he may not recover under the Missouri humanitarian doctrine, but must rely exclusively upon the last clear chance doctrine. If he has sufficient facts to make a case under the Missouri humanitarian doctrine, but not sufficient to make a case under the last clear chance doctrine, he may recover if he has filed his suit on the

north side of Market Street in the state court, and will be denied recovery if he has filed his suit on the south side of Market Street in the United States District Court. He will be denied recovery in Illinois whether he files his suit in the state or the federal court. He will be denied a recovery in every other state regardless of whether he sees fit to file his action in a state or federal court. As a consequence, there can be no uniformity of right or remedy if the opinion of the Court below shall be permitted to stand.

II.

The fundamental requisite for liability under the Act is, of course, negligence on the part of the defendant. However, the mere existence of negligence is not sufficient to create liability. It is necessary to go one step further and show that defendant's negligence, "in whole or in part," was the proximate cause of the casualty. As petitioner construes the evidence in this record, which is wholly uncontradicted and which is limited to that produced by respondent, there is no proximal causal negligence shown on the part of petitioner; but decedent's own negligence was the sole proximate cause of his death.

The scene of this casualty was a busy terminal switching yard. Decedent and his fellow employees were engaged in the switching of freight cars. Prior to the switching movement which resulted in decedent's death, the crew had been to a particular point to pick up a car which was moved about that hour practically every day. Apparently the car could be picked up only by moving the engine forward and coupling the car to the forward end of the engine; but when the car was brought from the industry out to the switch yard it had to be put on a particular track. The only practical way of getting the car on that track was to make a flying switch or to drop the car.

Decedent had not on any prior occasion worked with switch foreman Luthy (R. 20). Obviously, decedent's youth and the fact that Luthy had never seen him before (R. 20) explain why the foreman was at such pains to explain to decedent the exact switching movement which was to take place, and to warn decedent against the danger involved if he didn't watch where he was going. In any event, however, decedent was warned three times to watch out for the movement of the locomotive over the cross-over, and was informed in detail exactly how the movement was to be made (R. 46). As a consequence the question of his sole responsibility for his death must be determined in view of the fact that he had been specifically notified and warned of the movement to be made and of the necessity of keeping clear of both the locomotive and the car. It must be borne in mind, too, that from the commencement until the time of decedent's death, the locomotive bell was ringing a warning (R. 44, 80).

This switching movement commenced immediately after the conversation decedent had with his foreman in which he had been warned and cautioned to be on guard. It is impossible, therefore, to conclude that in the lapse of such a short time between the conversation and the casualty, decedent had forgotten the conversation and warnings which his foreman had just given him. On the other hand, if it is possible to conclude that decedent had forgotten such warnings, three times given, then it would seem to be entirely useless at any time to warn a switchman of an intended movement in a switching operation.

Unless decedent within that brief time had forgotten the warnings he had received, it cannot be said that he was oblivious to the danger of stepping upon the track immediately in front of the moving locomotive. Obviously, the switching crew had every right to expect decedent to stay out of the path of both the locomotive and the

engine. Consequently, no reason can be seen for the keeping of any special lookout for decedent under these circumstances, even though this record discloses that it was customary for engine men to watch out for persons on the track when it was possible for them to do so and at the same time perform the other duties required of them (R. 71, 81); and even though there were no obstructions to the engineer's view towards the east and north, whereby decedent remained in the physical view of the engineer at all times (R. 61, 62).

Therefore, there was no negligence on the part of petitioner; and there was gross proximate negligence on the part of decedent.

III.

Although the Court below has written three opinions in this case, but two of them appear in this record. In the second opinion it held that the provisions of the Federal Employers' Liability Act establishing comparative negligence as a governing rule of liability, in effect destroyed both the last clear chance doctrine and the Missouri humanitarian doctrine. In the present (third) opinion of the Court below it is said that it makes no difference whether the record facts fit the pattern of the humanitarian doctrine of Missouri or the last clear chance doctrine. The principal instruction upon which respondent recovered her verdicts both in the first and second hearings in the trial court, submitted as the sole hypothesis of recovery facts warranting a verdict in her favor under the principles of the Missouri humanitarian doctrine, which is the Missouri version of the last clear chance doctrine.

The particular and grave question which arises, and one reason why this Court should assume jurisdiction and determine the issue, is whether or not the Federal Em-

ployers' Liability Act has destroyed last clear chance negligence as a ground of recovery in actions brought under the Act. As petitioner views it, the comparative negligence principle found in the Act, has nothing whatever to do with last clear chance negligence, for the reason that the last clear chance rule does not commence to operate until both primary and contributory negligence have ceased to affect the responsibility for the casualty. Petitioner's position on this question is supported by the only decisions which it has been able to find on the question, some from Canada and some from the state courts of states which have passed comparative negligence statutes.

IV.

This Court has said several times that no recovery may be had under the Act except upon principles which are recognized and applied by the federal courts. Consequently, there is presented the question of whether or not recovery may be had under the Act in an action based upon the principles of the Missouri humanitarian doctrine, which no federal court has ever accepted and applied. The principles of that doctrine do not require proof of the termination of a decedent's negligence prior to his fatal injury or of defendant's actual notice of decedent's peril. The last clear chance doctrine recognized and applied by this Court and other federal courts requires proof of both. Petitioner says, therefore, that the Court below has affirmed the judgment in this case upon a principle of law which has never been recognized or applied by this Court or by any other federal court. Consequently, the opinion of the Court below is erroneous for the reason that it has permitted recovery upon a legal theory which has never been accepted by any of the federal courts as a ground for liability in cases under the Act.

V.

As petitioner reads this record, the facts fail to make a submissible case under the last clear chance doctrine as it is interpreted and applied by the federal courts. Petitioner's position is that if respondent is to recover despite her decedent's negligence, then her recovery must be had under the federal last clear chance doctrine. The facts in this record do not disclose a case under that doctrine, for the reason that admitting for the sake of argument only that decedent's negligence was not the sole proximate cause of his death, the evidence in this record clearly shows that his negligence continued up to the very instant of his death (R. 45). Moreover, the evidence wholly fails to show any actual notice on the part of the engineer of petitioner's locomotive that decedent was in peril (R. 58). For both of these reasons respondent has failed to make a case under the last clear chance doctrine.

VI.

As heretofore stated there is no testimony in this case except on behalf of respondent, as petitioner sought a directed verdict at the end of plaintiff's testimony, and when that was refused, offered no evidence. As a consequence, none of respondent's evidence is disputed or in any way challenged.

The position of respondent's counsel as shown by his argument to the jury (R. 164, 165, 179, 180, 181, 182, 183, 185, 186, 188 and 190) was that although his witnesses had testified to certain facts, viz., that decedent had been warned three times to look out for the locomotive and had been told just what the movement would be; that the engineer did not see decedent at any time during the switching movement subsequent to the conversation between

decedent and the switch foreman; that the engineer did not see the stop signal given by the switch foreman; nevertheless the jury should find the exact contrary of what his own witnesses had sworn; that his witnesses were not worthy of belief because they were in the employ of the petitioner, and the jury which should find exactly to the contrary of what respondent's witnesses had testified.

As appellant understands the rule in the federal courts, a party is bound by the testimony of his own witnesses provided it is inherently credible and there is no contrary evidence in the case. Certainly he cannot put the witnesses upon the stand, vouch for their credibility, have them tell their stories of the happening, and then ask the jury to believe that exactly the contrary happened, without any evidence whatever to support a contrary inference.

VII.

The argument made by plaintiff's counsel to the jury was viciously unfair and highly prejudicial. A reading of this record will disclose that the verdict of the jury was not arrived at in that calm, judicial frame of mind which is required if justice is to be done to both parties.

PRAYER.

Wherefore, petitioner prays that a writ of certiorari be issued by this Court, addressed to the Supreme Court of Missouri, directing that Court to certify to this Court on a day certain to be named therein, a full and complete transcript of the record of the proceedings in said cause of Gertrude Mooney, Administratrix of the Estate of Neil P. Mooney, respondent, v. Terminal Railroad Association of St. Louis, a corporation, appellant, that Court's number 39,202, to the end that said judgment of said Court

below may be reviewed by this Court, as provided by law, and that upon such review the judgment of said Supreme Court of Missouri in said cause, which became final on the second day of April, 1945, when petitioner's motion for a rehearing or to transfer to said court en banc was overruled; shall be reversed, and that petitioner shall have such relief as to this Court shall seem appropriate.

ARNOT L. SHEPPARD,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SUMMARY OF ARGUMENT.

I.

The jurisdiction of this Court is clear, as this is an action brought under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65). Section 237 of the Judicial Code as amended by the Act of February 13, 1925, Chap. 229, 43 Stat. 937, Title 28, U. S. C. A., Sec. 344 (b), provides for review in this Court by certiorari of decisions of the highest courts of the several states where any right, title, privilege or immunity, is specially set up or claimed under a statute of the United States.

Brady v. Southern R. Co., 320 U. S. 476, 479, 88 L. Ed. 239, 242;
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Steeley v. Kurn et al., 313 U. S. 545, 61 S. Ct. 1087, 85 L. Ed. 1512;
Seago, Admrx., v. New York Central R. Co., 315 U. S. 781.

II.

If the opinion of the Court below is permitted to become authoritative, the uniformity of right and remedy sought to be effected by the Act (Brady v. Southern R. Co., 320 U. S. 476, 479, 88 L. Ed. 239, 242) is utterly destroyed.

The various courts apply the doctrine which permits a plaintiff to recover notwithstanding his own fault or negligence in different ways, each requiring its own quantum and quality of evidence. It suffices for our purpose to divide the different applications of this rule into two

classes, "the last clear chance doctrine" and "the Missouri humanitarian doctrine." Both stem from the same source, as do all of the versions of the doctrine permitting recovery notwithstanding plaintiff's fault.

(a) The last clear chance doctrine as interpreted and applied by the federal courts requires as requisites to liability proof: (1) of plaintiff's position of imminent peril; (2) of defendant's actual notice thereof; (3) of the termination of plaintiff's own negligence prior to injury; (4) of defendant's ability, after acquiring such actual notice and subsequent to the termination of plaintiff's negligence, to avert the impending injury; (5) of defendant's negligent failure so to do, and (6) of plaintiff's proximately resulting injury.

K. C. Southern R. Co. v. Ellzey, 275 U. S. 236, 48 S. Ct. 80, 81, 72 L. Ed. 259, 261;
Chunn v. City & Suburban Ry., 207 U. S. 302, 52 L. Ed. 219;
St. L. & S. F. R. Co. v. Schumacher, 152 U. S. 77, 38 L. Ed. 361, 362;
Toledo, St. L. & W. R Co., 276 U. S 166, 72 L Ed. 513, 517;
Denver City Tramway Co. v. Cobb, 90 C. C. A. 459, 164 F. 41.

(1) Moreover, the federal doctrine of last clear chance applies to cases brought under the Act as well as to other negligence cases.

Iowa Central Ry. Co. v. Walker, 203 F. 685;
DeBaur v. Lehigh Valley R. Co., 269 F. 694;
Southern R. Co. v. Verelle, 57 F. 2d 1008;
Brennan v. B. & O. R. Co., 115 F. 2d 555.

(b) The Missouri humanitarian doctrine requires proof of the following elements: (1) plaintiff's position of peril, (2) defendant's actual or constructive knowledge thereof, (3) defendant's ability thereafter to avoid injury to plain-

tiff, (4) defendant's negligent failure to take the available steps to avoid the injury, and (5) the resulting injury to plaintiff.

Banks v. Morris & Co., 302 Mo. 254, 267, 257 S. W. 482.

The last clear chance doctrine therefore requires proof that defendant had actual rather than constructive knowledge of plaintiff's peril, whereas the Missouri humanitarian doctrine requires proof of either actual or constructive notice of plaintiff's peril. The last clear chance doctrine requires proof that plaintiff's negligence had terminated before the casualty occurred; whereas the Missouri humanitarian doctrine requires no such proof.

Obviously, therefore, the liability encompassed by the Missouri humanitarian doctrine is considerably broader than that embraced by the last clear chance doctrine. More proof is required for submission under the last clear chance doctrine than under the Missouri humanitarian doctrine.

(c) Because the elements of the two doctrines are different, it necessarily follows that because the federal courts accept and apply the last clear chance doctrine and do not accept and apply the Missouri humanitarian doctrine, there can be no recovery based upon the principles of the latter doctrine in any case brought under the Act. Congress purposed that the Act should be comprehensive "of those instances in which it excludes liability" as well as in "those in which liability is imposed." Its purpose was "to withdraw all injuries to railroad employees in interstate commerce from the operation of varying state laws, and to apply to them a national law having a uniform operation throughout all the states." The purpose of

Congress was emphatically not to leave the states free to require "compensation where the Act withholds it."

Erie R. Co. v. Winfield, 244 U. S. 170, 172, 61 L. Ed. 1057, 1065;
N. Y. C. R. Co. v. Winfield, 244 U. S. 147, 150, 61 L. Ed. 1045, 1048;
C. M. & St. P. R. Co. v. Coogan, 271 U. S. 472, 474, 70 L. Ed. 1041, 1043.

(d) Therefore, if the courts of Missouri are to be permitted to allow recovery in this character of case, under the Missouri humanitarian doctrine which requires proof of two fewer elements than does the federal last clear chance doctrine which alone is accepted and applied by the federal courts and by all state courts except those of Missouri, there can be no uniformity of right or remedy.

(e) The incongruity of the opinion of the Court below lies in the fact that whereas it has affirmed the judgment rendered in the trial court on the theory of the applicability of the Missouri humanitarian doctrine which alone is hypothesized in respondent's instruction directing a verdict in her favor, nevertheless it refuses to apply the federal last clear chance doctrine because it says that under the Act contributory negligence can never be taken out of the case. Obviously, if the Act destroys the last clear chance doctrine, it unquestionably destroys the Missouri humanitarian doctrine as well, for as the Court below has held many times, a necessary requisite to the applicability of the Missouri humanitarian doctrine is that both primary and contributory negligence shall be wholly disregarded, and defendant's liability must be measured solely on its ability and its failure to avert the injury in question, after both primary and contributory negligence have "passed out of the case."

State ex rel. Fleming v. Bland, 322 Mo. 565, 572, 15 S. W. (2d) 798, 801;

Todd v. St. L.-S. F. R. Co., 37 S. W. (2d) 557, 561;
Gray v. Columbia Terminals Co., 331 Mo. 73, 52 S W. (2d) 809, 813.

(1) In fact, the Court below has gone to the extent of holding not only that "contributory negligence is an issue wholly foreign to a case submitted purely under the humanitarian rule"; but has held that an instruction offered by a defendant which submits contributory negligence as a defense only in case the jury shall find against plaintiff under the humanitarian rule, constitutes reversible error, because both primary and contributory negligence have "passed out of the case" and the instruction injected "into the case a foreign issue."

Todd v. St. L.-S. F. R. Co., supra;
Gray v. Columbia Terminals Co., supra.

III.

The Court below holds in the second opinion herein and reiterates in its latest opinion, that because the Act provides that contributory negligence shall not bar plaintiff's cause of action but shall effect a diminution of damages only, the last clear chance doctrine as interpreted and applied by the federal courts can no longer sustain liability in cases under the Act.

The Court below reasons as follows: The federal last clear chance doctrine requires the termination of plaintiff's negligence as a condition precedent to the applicability of that doctrine. The Act destroys plaintiff's contributory negligence as a defense to a suit under the Act, and keeps it in the case as a decisive factor in determining the amount of damages. Therefore, the Act has done away with the doctrine of last clear chance. Assuming the correctness of this reasoning, it is interesting to speculate how the Court below can affirm a judgment based upon the Missouri humanitarian doctrine, which

is no more than Missouri's version of the last chance doctrine.

(a) It is submitted that the opinion of the Court below is erroneous for the reason that in considering a case under the last clear chance doctrine, the question is not whether both plaintiff and defendant have been negligent, but whether or not even though both parties have been negligent, the defendant after the termination of plaintiff's negligence, whether contributory or sole, and after actual discovery of plaintiff's peril, had a later opportunity to avoid injuring the plaintiff and failed to take advantage of it.

(1) The principles of the last clear chance doctrine do not and cannot commence to operate until the point has been reached where the antecedent negligence of both plaintiff and defendant is to be wholly ignored in the determination of liability vel non. No last clear chance duty is cast upon defendant until that point shall have been reached.

(2) The recognition and application of the comparative negligence rule in no wise affects the last clear chance doctrine.

Seiffert v. Hines, Director General, 108 Neb. 62, 187 N. W. 108;
Stanley v. C. R. I. & P. R. Co., 113 Neb. 280, 202 N. W. 864;
Parsons v. Berry, 130 Neb. 264, 264 N. W. 742;
Wolfgang v. Omaha & Council Bluffs St. Ry. Co., 126 Neb. 600, 262 N. W. 537, 17 Neb. L. D. 68 (1938);
McLaughlin et al. v. Long et al. (1927), 2 D. L. R. 186;
Johnston v. McMorran (1927), 4 D. L. R. 335;
Raines v. Southern R. Co., 169 N. C. 189, 85 S. E. 294.

(b) The last clear chance doctrine does neither more nor less than provide a method of fixing liability on defendant provided his negligence was the proximate cause of the injury.

Chunn v. City & Suburban Ry. Co., 207 U. S. 302, 309, 28 S. Ct. 63, 52 L. Ed. 219;
Norfolk & Western R. Co. v. Earnest, 229 U. S. 114, 57 L. Ed. 1096, 1101;
Seaboard Air Line R. Co. v. Tilghman, 231 U. S. 499, 501, 59 L. Ed. 1069, 1070;
I. C. R. Co. et al. v. Porter, 207 F. 311, 316;
Pennsylvania R. R. Co. v. Swartzel, 17 F. (2d) 869, 870.

(1) The Act uses the term "contributory negligence." There can be no "contributory" negligence in the absence of primary negligence by defendant. Therefore, the provision of the Act that plaintiff's contributory negligence shall not bar his recovery but shall do no more than diminish the amount of his recovery not only presupposes negligence by both plaintiff and defendant, but presupposes also that the negligence of both shall continue to the instant of injury and shall together constitute the proximate cause of the casualty.

Norfolk & Western R. Co. v. Earnest, 229 U. S. 114, 57 L. Ed. 1096, 1101;
Seaboard Air Line R. Co. v. Tilghman, 237 U. S. 499, 501, 59 L. Ed. 1069, 1070;
I. C. R. Co. et al. v. Porter, 207 F. 311, 316.

(2) It is obvious that if after the termination of plaintiff's negligence and upon actual discovery of his danger by defendant, the latter has an opportunity to avoid injuring the former, neither plaintiff's nor defendant's antecedent negligence can form a part of the proximate cause of his injury, and all antecedent negligence is as though it had never existed. The duty then for the

first time in the course of the happening, rests upon the defendant to avoid injury to plaintiff. It is the violation of this duty which is the foundation of liability under the last clear chance doctrine.

IV.

The facts in the case at bar, and they are wholly undisputed and consist solely of the testimony of respondent's witnesses, do not disclose an action in respondent's favor under the last clear chance doctrine. The evidence wholly fails to show the termination of decedent's negligence prior to the casualty, that petitioner's engineer had any actual notice of any danger to decedent, and that the engine could have been stopped or any additional warning (the bell was ringing) could have averted the casualty. Consequently, petitioner's engineer had no opportunity to avoid injuring decedent, who was struck by the locomotive just as he stepped upon the track (R. 45). The facts being undisputed, no jury question was made.

DeBaur v. Lehigh Valley R. Co., 269 F. 964;
Southern R. Co. v. Verelle, 57 F. (2d) 1008;
Unadilla Valley R. Co. v. Caldine, 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224.

V.

Appellee's own gross negligence in stepping on the track at practically the same instant he was struck, and after he had been three times informed particularly how the switching movement was to be made and warned to stay out of the way of both the car and the engine, was the sole proximate cause of his death.

Atlantic Coast Line R. Co. v. Driggers, 279 U. S. 787, 73 L. Ed. 957;
Unadilla Valley R. Co. v. Caldine, 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224;
DeBaur v. Lehigh Valley R. Co., 269 F. 964;
Southern R. Co. v. Verelle, 57 F. (2d) 1008.

VI.

As has been stated, all of the evidence in this case was produced by respondent. It is in no way inherently incredible; it is not contradicted; the witnesses displayed no hostility towards respondent's cause. For that reason respondent is bound by the testimony.

Pennsylvania R. Co. v. Chamberlain, 228 U. S. 333, 77 L. Ed. 819;
Southern Ry. Co. v. Walters, 284 U. S. 190, 76 L. Ed. 239.

Despite this situation, respondent's counsel took the position in arguing this case to the jury, that his own witnesses were unworthy of belief, and that even though there was no evidence to contradict anything his witnesses said, the jury should refuse to believe the witnesses, and should find a verdict directly in the face of the testimony of his witnesses and base it not upon any evidence, but upon the theory that whatever evidence he introduced was false (R. 164, 165, 179, 180, 181, 182, 183, 185, 186, 188 and 190).

VII.

Respondent's counsel committed reversible error in his argument to the jury in the trial court, under the law as announced by this Court. He made a viciously unfair attack upon his own witnesses and appealed to the passions and prejudices of the jurors to such an extent that it created an "atmosphere of hostility" towards appellant in this case and prevented it from obtaining a fair trial.

He repeatedly charged his own witnesses with false swearing, and time after time requested the jury not to believe their evidence, but to find a verdict directly contrary to their evidence, although such a verdict would be wholly unsupported by any evidence. He warned the jury that

they should be very careful in accepting the testimony of his own witnesses, because they were in appellant's employ (R. 181).

He informed the jury that he knew why decedent was in the position he was when he was killed and that he was looking for a block to keep the car which was being switched from rolling back and fouling the switch point, although there was no evidence whatever to sustain his statement (R. 186).

He misstated the law with respect to the yardstick for measuring respondent's damages (R. 149), by saying that respondent should recover decedent's total earnings for thirty-five years, less what the support of his wife and children would have been during that period, rather than the present value of decedent's earnings which is the correct measure given in her own instruction No. 7 (R. 49).

L. & N. R. Co. v. Holloway, 246 U. S. 525, 62 L. Ed. 867.

This character of argument has been condemned by this Court which has held that it cannot be cured by a remittitur, but the situation calls for a new trial, especially if the verdict is excessive. The Court will notice that the verdict in this case rendered by the jury was for the sum of Fifty-five Thousand Dollars ($55,000.00). It can scarcely be denied that the verdict was excessive in view of the fact that the trial court ordered a remittitur of of Ten Thousand Dollars ($10,000.00) and respondent remitted that sum (R. 195).

M. St. P. & S. S. M. R. Co. v. Moquin, 283 U. S. 520, 51 S. Ct. 501, 75 L. Ed. 1243.

ARGUMENT.

I.

This Court's jurisdiction is well settled in this character of case, as it is an action brought under the Federal Employers' Liability Act, and the controversy therefore involves a right claimed under that act of Congress.

The reasons for the exercise by this Court of its jurisdiction over this case are highly persuasive. For the first time since the passage of the Act a suit brought under its terms has been decided upon the theory that its provisions destroy last clear chance negligence as a ground for recovery in this character of case. It is difficult to underestimate the importance of an authoritative ruling by this Court on this question. Despite the fact that several federal courts have applied the doctrine of last clear chance to actions brought under the Act, the Missouri Supreme Court in its second and third opinions herein definitely holds in effect that because the Act provides for the application of the comparative negligence principle by declaring that a plaintiff's contributory negligence shall not bar his right to recover but shall do no more than diminish the amount he may recover, there can be no recovery in this character of case under the doctrine of the last clear chance.

In the same opinion, however, the Court below holds that recovery may be had upon the principles of the Missouri humanitarian doctrine. Both the last clear chance doctrine and the humanitarian doctrine are based upon the theory that a plaintiff may recover in spite of or notwithstanding his own negligence, provided defendant's negligence was the proximate cause of the injury. Consequently, under both of the doctrines it is necessary that the defendant's primary negligence and the plaintiff's contributory negligence must be taken out of the case before the question of liability may be determined upon either

the last clear chance doctrine or the Missouri humanitarian doctrine. Obviously, therefore, they stand upon the same footing, so far as the comparative negligence principle established by the Act is concerned. As a consequence, if there can be no recovery on the last clear chance doctrine because of the existence of the comparative negligence principle established by the Act, for the same reason there can be no recovery on the Missouri humanitarian doctrine.

The question here involved, therefore, is of the most serious moment to all of the railroads and to all of their employees.

It is said in the second opinion of the Court below (176 S. W. 2d, l. c. 611): "We think these facts raised an issue for the jury, though the question is close and ultimately a Federal question." This Court is in agreement. Brady v. Southern R. Co., 320 U. S., l. c. 479, 88 L. Ed., l. c. 243.

II.

Unless this Court accepts jurisdiction on this cause and decides the questions here involved, the uniformity of right and remedy sought to be effected by the Act [Brady v. Southern R. Co., 320 U. S. 476, 479, 88 L. Ed. 239, 242] is completely destroyed.

The principle upon which recovery is permitted plaintiff notwithstanding his own negligence is interpreted and applied in many ways. For the purposes of our discussion it is found convenient to distinguish two of the versions of that doctrine by calling one the "last clear chance doctrine" and another the "Missouri humanitarian doctrine." Both stem from the same source and are but different applications of the same principle.

(a) The last clear chance doctrine as interpreted and applied by the federal courts, including this Court, re-

quires proof of certain facts as predicates of liability. See Summary of Argument, supra, III (a). At this point we are concerned with but two of those predicates, viz., (1) actual notice to defendant of plaintiff's perilous position, and (2) the termination of plaintiff's negligence prior to the casualty.

(1) So far as petitioner has been able to determine, this Court has never directly passed upon the applicability of the last clear chance doctrine to actions brought under Federal Employers' Liability Act; but other federal courts have recognized its applicability. These cases have been cited in the Summary of Argument under III, (a), (1).

(b) The Missouri humanitarian doctrine requires proof of five elements: (1) plaintiff's position of peril, (2) defendant's actual or constructive knowledge thereof, (3) defendant's ability thereafter to avoid injuring the plaintiff, (4) defendant's negligent failure to take the available steps to avoid the injury, and (5) resulting injury to the plaintiff. Bank v. Morris & Co., 302 Mo. 254, 267, 257 S. W. 482.

It will be noticed that there are two sharply defined differences between the last clear chance doctrine as interpreted and applied by the federal courts, and the Missouri humanitarian doctrine. Under the former, plaintiff is required to prove defendant's actual knowledge of plaintiff's perilous position, whereas under the latter he is required to prove only constructive knowledge of such peril. Under the federal last clear chance doctrine plaintiff must prove that his negligence terminated before the casualty, and, moreover, a sufficient length of time before the occurrence to give defendant an opportunity to take steps to avoid it; whereas under the Missouri humanitarian doctrine there is no such requirement.

These differences between the two doctrines are of vital importance. Proof amply sufficient to warrant a recovery

under the Missouri humanitarian doctrine is wholly insufficient to warrant a recovery under the last clear chance doctrine, for the reason that it wholly fails to prove two necessary elements of the last clear chance doctrine, viz., defendant's actual notice of plaintiff's peril and the termination of plaintiff's negligence prior to injury. Moreover, a petition which pleads and instructions which submit a Missouri humanitarian doctrine case are wholly insufficient to state and submit a cause of action under the last clear chance doctrine, for the reason that neither the petition nor the instructions need cover these two elements of the last clear chance doctrine.

(c) It necessarily follows, therefore, that because the federal courts accept and apply the last clear chance doctrine and do not accept and apply the Missouri humanitarian doctrine there can be no recovery under the Missouri humanitarian doctrine in any case brought under Federal Employers' Liability Act.

When Congress passed the Act, it intended that it should be comprehensive "of those instances in which it excludes liability" as well as "those in which liability is imposed." The purpose of the Act was "to withdraw all injuries to railroad employees in interstate commerce from the operation of varying state laws, and to apply to them a national law having a uniform operation throughout all the states"; and not to leave the state free to require "compensation where the Act withholds it." Erie R. Co. v. Winfield, 244 U. S. 170, 172, 61 L. Ed. 1057, 1065; N. Y. C. R. Co. v. Winfield, 244 U. S. 147, 150, 61 L. Ed. 1045, 1048; C. M. & St. P. R. Co. v. Coogan, 271 U. S. 472, 474, 70 L. Ed. 1041, 1043.

As this Court has said in many cases, the Federal Employers' Liability Act occupies the entire field of liability between employees of railroads and their employers, engaged in interstate commerce; and excludes regula-

tion thereof by the state, either legislatively or judicially. Because respondent seeks recovery under that Act of Congress, her rights must be determined and adjudicated by the rules accepted and applied by the courts which have jurisdiction to interpret that Act. It requires no citation of authority to support the statement that only the federal courts have jurisdiction to interpret and apply the Act.

Because the Act does not define what shall or shall not constitute actionable negligence, this question must be determined by the courts which have the power to interpret the Act, viz., the federal courts. Necessarily, this determination requires the federal courts to determine also what acts shall not be recognized as actionable negligence under the Act. As a consequence, when the federal courts recognize proof of certain facts as establishing actionable negligence on the part of a defendant, obviously and necessarily evidence which falls short of proving those facts falls short as well of proving a case under the Act.

To state it somewhat differently, the recognition and application of the requisites for last clear chance negligence by the federal courts establishes the minimum requirements for liability notwithstanding plaintiff's negligence. Ipso facto, evidence which does not measure up to these minimum requirements is insufficient to make a case under the Act. Because evidence which may be sufficient to make a case under the Missouri humanitarian doctrine is wholly insufficient to make a case under the federal last clear chance doctrine, no recovery may be had in this character of case under the Missouri humanitarian doctrine.

(d) The conclusion is inescapable that unless this Court assumes jurisdiction in this cause and holds that there can be no judgment herein based upon the principles of the Missouri humanitarian doctrine, there can be no uniformity of right or remedy under this Act.

So far as petitioner has been able to ascertain, the Missouri humanitarian doctrine has no counterpart in any other jurisdiction in the United States, state or federal. This Court has held in many cases that a plaintiff may bring his suit under this Act in any state court or in any federal district court in which service may properly be had upon a defendant. Petitioner is subject to suit in both Missouri and Illinois. As a consequence, a plaintiff injured by the alleged negligence of petitioner in Missouri, may bring his action to recover damages therefor in the state court of Missouri, the federal district court of Missouri, the state court of Illinois, or the federal district court of Illinois. The Civil Courts Building in the City of St. Louis is directly across Market Street from the New Federal Building, the former on the north side of the street, the latter on the south. If the opinion of the Court below is permitted to become authoritative, plaintiff's right to recover in a case of this kind will depend on whether or not he files his suit on the north or the south side of Market Street. If he files it on the north side of Market Street in the state court he will be permitted to recover under the Missouri humanitarian doctrine. If he files it on the south side of Market Street in the United States District Court, he will not be permitted to recover because that Court does not recognize the Missouri humanitarian doctrine as a ground for recovery in this character of case, and plaintiff has not proved a last clear chance case. If he files his suit in either the state court or the Federal District Court in the State of Illinois, he cannot recover in either; for the reason that neither of those courts recognizes and applies the Missouri humanitarian doctrine. As a result of this situation, petitioner is put entirely at the mercy of respondent's caprice. If petitioner must defend a case of this character in the state court, it loses; if it has an opportunity to defend the same case in the federal court, it wins. Thus, the de-

cision in the case is not determined by the Federal Employers' Liability Act, nor is it determined by the law, by right or justice. The result is controlled solely by the choice of forum made by respondent.

This problem affects not only the situation as it exists in the State of Missouri; but due to the many and varying applications by the courts of the different states with respect to a plaintiff's right to recover notwithstanding his own negligence, the problem exists in those states as well. Many of them do not follow the last clear chance doctrine as announced by the federal courts. As a consequence, the same situation would exist in those states as exists here, viz., a plaintiff's ability to recover would depend upon whether he saw fit to commence his action in a state court or a federal district court.

(e) In any event, it is not seen how the opinion of the Court below can be affirmed.

This cause was submitted in the trial court (R. 147, 148) upon the principles of the Missouri humanitarian doctrine. There is no requirement in respondent's principal instruction that the jury shall find either that petitioner's servant had actual knowledge of decedent's danger or that decedent's negligence terminated prior to his injury. Therefore, the instruction is wholly insufficient to submit this case under the federal last clear chance doctrine.

The Court below has affirmed the judgment so obtained, and justifies its action by saying that under the Act contributory negligence can ever be taken out of a case brought under the Act. This conclusion reached by the Court below will be discussed in detail in the next section of this argument. It is obvious, however, that if this conclusion is correct, then necessarily there can be no recovery herein under the Missouri humanitarian doctrine.

The Missouri courts describe defendant's negligence which is antecedent to the commencement of its duty under the principles of the Missouri humanitarian doctrine, as primary negligence; and plaintiff's negligence antecedent to the commencement of defendant's duty under that doctrine, contributory negligence. For convenience those terms will be used in this discussion.

If, as is implicitly held in the current opinion of the Court below, contributory negligence continues to be a decisive factor in all cases prosecuted under this Act, then obviously the reason for the existence of any principle permitting recovery notwithstanding plaintiff's negligence ceases to exist. If the conclusion of the Court below is sound, then every case brought under the Act must be decided exclusively upon the existence of primary negligence on the part of defendant, and, if the evidence is sufficient to prove it, contributory negligence on the part of plaintiff. The necessary result is that if defendant has been guilty of any primary negligence, plaintiff will always be entitled to recover no matter how gross his negligence may have been; no matter how long it continued; and no matter if defendant never saw plaintiff in a position of danger. As a consequence, there will never be an occasion for applying the principles which permit recovery notwithstanding the negligence of plaintiff.

But the Court below has held for a long period of years and in many cases that if recovery is had upon the Missouri humanitarian doctrine both primary and contributory negligence shall be wholly disregarded and shall perform no decisive service in the case. On the other hand, in that character of case defendant's liability must be measured solely on its ability and its failure to avert the injury in question after both primary and contributory negilgence have "passed out of the case." State ex rel. Fleming v. Bland, 322 Mo. 565, 572, 15 S. W. 2d 798, 801.

(1) The Court below has carried this doctrine to such an extent that it holds not only that "contributory negligence is an issue wholly foreign to a case submitted purely under the humanitarian rule"; but has condemned as reversibly erroneous an instruction given at defendant's request which submits contributory negligence as a defense only in case the jury shall find against plaintiff under the humanitarian rule. The reason assigned by the Court is that both primary and contributory negligence had "passed out of the case" and such an instruction injected "into the case a foreign issue." Gray v. Columbia Terminals Co., 331 Mo. 73, 52 S. W. 2d 809, 813.

Despite these decisions, the present opinion of the Court below says:

> "Whether the facts as proven fit the pattern of the humanitarian doctrine as recognized by the Missouri courts or whether the facts fit the pattern of the last chance rule has nothing to do with this case."

In view of the fact that this case was submitted in the trial court exclusively on the Missouri humanitarian doctrine, this language of the Court is difficult to understand. Moreover, when the decisions of the Court below holding that before the Missouri humanitarian doctrine can become applicable, all primary and contributory negligence must have "passed out of the case" it becomes more difficult to understand how that Court could have affirmed the judgment of the trial court and at the same time held that it made no difference whether the facts proved brought the case within the last clear chance doctrine or the Missouri humanitarian doctrine.

Is it to be supposed that in every case except one under the Act, which reaches the Court below and which has been decided upon Missouri humanitarian negligence, it will be held that both primary and contributory negligence have passed out of the case before the humani-

tarian doctrine commenced to operate, whereas in every case which reaches the Court below and which is founded upon the Federal Employers' Liability Act, it will be held that regardless of the character of negligence submitted, whether last clear chance or Missouri humanitarian, contributory negligence remained in the case for all purposes? In other words, will the Court below hold in all humanitarian doctrine cases except those brought under this Act, that the antecedent negligence of both plaintiff and defendant has ceased to be a determinative factor and that the doctrine is applicable, and at the same time hold that in all cases brought under the Act, the antecedent negligence remains a determinative factor, and nevertheless affirm a recovery under the Missouri humanitarian doctrine.

III.

The holding of the Court below both in the present opinion and in the second opinion is that because the Act provides that contributory negligence shall not bar plaintiff's cause of action, but shall do no more than diminish the recoverable damages, the last clear chance doctrine as interpreted and applied to the federal courts, is never applicable to this character of case.

On this question the Court below said on page 3 of the current opinion that petitioner's principal point upon appeal was that this cause was submitted to the jury under the Missouri humanitarian doctrine which is not recognized by the federal courts, rather than the last clear chance doctrine which is recognized by the federal courts. That Court proceeded with the statement that the respondent insisted that this cause must be governed by the federal statute (Federal Employers' Liability Act) and that the distinction between the humanitarian doctrine and the last clear chance doctrine has no bearing on the case. "We are of the opinion that respondent's position is correct,"

said the Court. "We so held on the former appeal * * * where the question was discussed at length. * * * We have again examined the question and we adhere to our former ruling."

The former opinion (the second opinion) states that appellant (petitioner here) contended that no prima facie case was made in the trial court for the reason that respondent made no case under the last clear chance doctrine whereas the cause was submitted to the jury under the Missouri humanitarian doctrine which is not recognized by the federal courts as furnishing a basis for liability.

The Court then stated respondent's position as follows:

> "Respondent argues to the contrary that under the express terms of the Federal Employers' Liability Act the defendant railroad is liable for its own negligence regardless of whether the contributory negligence of the injured person was actualy discovered or merely reasonably discoverable; and also regardless of whether that contributory negligence had ceased so that the defendant had a last chance to avert the casualty, or whether it continued actively up to the event. In other words, respondent maintains the contributory negligence does not defeat the **right** (emphasis the Court's) of recovery, but affects only the **amount** (emphasis the Court's) or recovery. We think this latter view is correct."

On page 4 of the present opinion the Court below says further:

> "The vital questions, therefore, * * * were whether the defendant's agents and servants were negligent and if so whether such negligence in whole or in part contributed to Mooney's injury. An affirmative answer to both questions establishes liability. Whether the facts as proven fit the pattern of the humanitarian doctrine as recognized by the Missouri courts or whether the facts fit the pattern of the last

> chance rule has nothing to do with the case. The federal Act does not make any exception, nor should one be read into the law by the court."

On the next page, 5, of the second opinion written by the Court below, and after quoting certain language from the Act, the Court says:

> "There is nothing on the face of these sections warranting the construction that the contributory negligence of the deceased **will** (emphasis the Court's) bar a recovery if not timely discovered or if continued up to the moment of his injury. They say the opposite."

There is but one conclusion which may be drawn from this language, namely, that because of the provision in the Act that contributory negligence on the part of the plaintiff shall not bar his recovery for damages, the last clear chance doctrine can no longer sustain liability in cases under the Act. The Court below reasons as follows: The federal last clear chance doctrine requires the termination of plaintiff's negligence as a condition precedent to the applicability of that doctrine. The Act destroys plaintiff's contributory negligence as a defense to a suit under the act, but leaves it effective only to diminish the amount of plaintiff's recovery. Therefore, the Act has done away with the doctrine of last clear chance.

The fault in this reasoning lies in the failure to recognize that like all other kinds of negligence, last clear chance negligence is a breach of duty owed plaintiff by defendant. No duty to avoid injuring plaintiff arises under the last clear chance doctrine unless and until defendant acquires actual knowledge of plaintiff's peril and the latter's negligence has ceased. Obviously, there can be no duty on defendant not to injure plaintiff until defendant knows of the existence of the danger to plaintiff. Just as obviously, defendant cannot be afforded the

last clear chance of avoiding the injury unless plaintiff's negligence ceases in time to make effective defendant's efforts to avoid it. Otherwise, plaintiff may always neutralize defendant's efforts to avoid the casualty, and, at the same time, hold defendant responsible for his injury.

There is no inconsistency between applying both the comparative negligence doctrine and the last clear chance doctrine under the Act. The comparative negligence theory applies only to primary and contributory negligence, whereas the federal courts hold that the last clear chance doctrine is but a phase of proximate cause, and is put in operation only if neither defendant's primary negligence nor plaintiff's contributory negligence is found to be the proximate cause of the injury. Pennsylvania R. Co. v. Swartzel, 17 F. (2d) 869, 870.

(1) The very essence of the last clear chance doctrine is the principle that neither the negligence of defendant nor that of plaintiff, which occurred prior to the actual discovery of plaintiff's peril shall in any wise affect the case. Unless both primary and contributory negligence are taken completely out of the case, there can be no last clear chance doctrine. There can be no reason for the existence of such a doctrine if both primary and contributory negligence are to remain effective in the case. Consequently, the last clear chance doctrine is based on the principle that at the time it commences to operate in plaintiff's favor, consideration of all previous negligence of both parties to the action must be wholly abandoned. It is a logical impossibility to apply the last chance doctrine to a case brought under the Federal Employers' Liability Act if its provisions are to be construed as keeping in the case for the consideration of both court and jury, the primary negligence of defendant and the contributory negligence of plaintiff, and thereby avoiding the reason for, and the commencement of, the operation of the last clear chance doctrine. How is it logically possible to apply a doctrine

which commences to operate only when a point is reached where all antecedent negligence of both parties has gone out of the case, if the action is brought under a statute the effect of which is to keep all antecedent negligence in the case?

If all antecedent negligence remains in every case brought under the Act, for the purpose of permitting plaintiff to recover, then such negligence remains in the case for all purposes. It cannot be in the case for the purpose of permitting plaintiff to make a prima facie case and be out of the case for the purpose of depriving defendant of taking advantage of it for the purpose of minimizing the damages. Necessarily, if, as the Court below has held, last clear chance negligence is destroyed by the Act and contributory negligence remains in the case, a defendant will be entitled to have the court instruct the jury that any recovery against it shall be diminished by the proportion that the decedent's negligence bears to the whole negligence in the case. Moreover, this will be true whether or not defendant has pleaded contributory negligence; for the very reason that under the holding of the Court below, contributory negligence cannot be taken out of the case by anything which is done by either of the parties. Therefore, it remains in the case for all purposes at all times. One of those purposes is to diminish the amount of plaintiff's recovery.

If this conclusion is correct, then what necessity is there for applying the last clear chance rule in any case brought under the Act? It can serve no purpose. If plaintiff recovers on primary negligence, and he must do so in the absence of any last clear chance doctrine, and if defendant is entitled to minimize plaintiff's damages by reason of the latter's contributory negligence, then the result is that the case is tried as an ordinary common law negligence case, without the necessity or possibility of the interposition of any last clear chance doctrine.

Suppose decedent had fallen on the track on the occasion of his death, as a result of an attack of epilepsy. Obviously, in that instance he could not have been guilty of any negligence whatever, sole or contributory. Suppose further that suit had been brought under the Act. Could recovery then have been had under the last clear chance doctrine as announced and applied by the federal courts?

Under the interpretation given the Act by the Court below, there could have been no recovery under any legal principle. That Court has said that that Act retains primary and contributory negligence, and prevents the application of either the humanitarian or the last clear chance rules for the reason that contributory negligence never goes out of the case.

Here is an instance in which there was neither primary nor contributory negligence. There could have been no primary negligence, as defendant was not responsible in any way for the perilous position of decedent on the track. Decedent could not have been guilty of any contributory negligence because his presence on the track resulted from something entirely beyond his control. Would it be held that there could be no recovery in the case at all, on the ground that the Federal Employers' Liability Act precluded the application of the last clear chance doctrine? Unless it would, then the interpretation of the language of the Act made by the Court below is unsound. Unless it would be so held, the Act still envisages a recovery thereunder on the last clear chance doctrine. Last clear chance negligence, we repeat, cannot be both in and out of the Act at the same time and for different cases and purposes. It is either discarded by the Act in every case and under every conceivable condition, or it is not discarded in any case or under any condition.

(b) It is submitted that the opinion of the Court below is erroneous for the further reason that in considering a case under the last clear chance doctrine, the question is not whether both plaintiff and defendant have been negligent, but whether or not even though both parties have been negligent, the defendant, after the termination of plaintiff's negligence, whether contributory or sole, had a later opportunity to avoid injuring plaintiff and failed to take advantage of it.

(1) There is no reason for the existence of the last clear chance doctrine, if the antecedent negligence of both plaintiff and defendant is to remain determinative of the case. If, as is held by the Court below, the Act, by recognizing the effect of the comparative negligence doctrine, keeps plaintiff's negligence in the case regardless of the existence or non-existence of proximal causal connection between it and plaintiff's injury, then there cannot possibly be a case in which there is any occasion for the application of the last clear chance doctrine.

The underlying principle of the last clear chance doctrine is that it does not commence to operate until the necessity therefor arises. No such necessity can arise if the case is to be determined exclusively upon the antecedent negligence of both plaintiff and defendant. Not only the name of the doctrine but the doctrine itself is wholly meaningless unless it becomes effective at the exact point where and when the antecedent negligence of both plaintiff and defendant produces such a condition as precludes the determination of whose negligence is the proximate cause of plaintiff's injury. When that point shall have been reached, then the law says that in order to avoid such an impasse, it will overlook all antecedent negligence and place the responsibility for the casualty upon him who had the last clear chance of avoiding it. Obviously, if the negligence of plaintiff continues to the

moment of injury, defendant cannot have had the last clear chance of avoiding injury to plaintiff. Unless defendant had actual notice of plaintiff's peril, he cannot avoid injuring plaintiff.

(2) The application of the principle of comparative negligence does not affect the last clear chance doctrine. The question has arisen several times in Nebraska and in Canada under comparative negligence statutes. In every case which petitioner has been able to find, the holding has been that the recognition and application of the comparative negligence rule in no wise affects the last clear chance doctrine. See Summary of Argument, III, (a), (2).

(b) As petitioner construes the decisions of this and other federal courts, the last clear chance doctrine is not a separate and distinct thing which grew "out of the establishment or creation of any new responsibility fixed by law upon wrongdoers," but it is neither more nor less than a method of creating liability upon a defendant if his negligence was in truth the proximate cause of plaintiff's injury. Pennsylvania R. Co. v. Swartzel, 17 F. (2d) 869, 870.

(1) This Court has recognized the last clear chance doctrine as but another aspect of the principle of proximate cause. This is conclusively shown by this Court's refusal to cast liability upon defendant without proof that plaintiff was actually seen in a position of peril, and that his negligence terminated prior to his injury, thereby giving defendant the last clear opportunity of avoiding injury to plaintiff. Failure to grasp that last clear chance then becomes the proximate cause of plaintiff's injury.

In Norfolk & Western R. Co. v. Earnest, 229 U. S. 114, 122, 57 L. Ed. 1096, 1101, while discussing the effect of contributory negligence under the provisions of the Act, this Court said that the amount of recoverable damages

should be in proportion to the amount of negligence attributable to the employee; and that the language in the Act "can only mean that where the **causal** negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount." This language was used again by this Court in Seaboard Airline R. Co. v. Tilghman, 237 U. S. 499, 501, 59 L. Ed. 1069, 1070.

(2) It is obvious, therefore, that if after the termination of plaintiff's negligence and upon actual discovery of his danger by defendant, the latter has an opportunity to avoid injuring the former, neither plaintiff's nor defendant's antecedent negligence can form any part of the proximate cause of plaintiff's injury, and whatever negligence either party to the action may have been guilty of is, for that reason, removed from consideration. The duty then for the first time in the course of the happening rests upon defendant to try avoid injury to plaintiff in view of the situation as it exists at that moment; that is, without any regard to whose fault has placed plaintiff in the perilous situation, it becomes the duty of the defendant, if he has actual notice of plaintiff's danger, to try to avoid injury to him. But, unless plaintiff's negligence has at that moment ceased, defendant does not have the last clear opportunity of avoiding injury to plaintiff. He has no later opportunity to avoid such injury than has plaintiff.

A very clear statement of this principle will be found in Mehring v. Connecticut Co. (1912), 86 Conn. 109, 84 A. 301, 45 L. R. A. (N. S.) 896. The rationale of this doctrine is no better stated anywhere than in the dissenting opinion of Judge Hatcher in Smith v. Gould, 110 W. Va. 579, 159 S. E. 53, in which the following language is quoted from Judge Cardozo, who said in Woloszynowski v. Ry. Co., 254 N. Y. 206, 172 N. E. 471, 472:

> "The doctrine of the last clear chance, however, is never wakened into action unless and until there is

brought to the defendant to be charged with liability a knowledge that another is in a state of present peril."

IV.

The facts in the case at bar, as developed by respondent's witnesses, and there are no others, fail to make a case under the federal last clear chance doctrine. There was but one witness who testified that he saw decedent killed. This sole eyewitness testified that decedent "stepped over that rail just as the engine hit him" (R. 45).

DeBaur v. Lehigh Valley R. Co., 269 F. 964, was an action under the act to recover for the death of a flagman who was killed while sitting on the track with his feet inside the rail, his elbows resting on his knees, and his head down on his arms. Recovery was denied because it was held that defendant could not have avoided killing decedent after actually discovering his perilous position. Subsequent to that time, the court said, the engineer did all that could be expected of him under the circumstances.

In Southern R. Co. v. Verelle, 57 F. (2d) 1008, a flagman stepped directly in front of a moving engine and was killed. Recovery was denied on the ground that there was no evidence showing that the enginemen had any reason to suspect that decedent intended to step on the track directly in front of the train; and when that fact became apparent it was too late to avoid killing him. These cases appear to be directly in point, especially the Verelle Case.

In Unadilla Valley R. Co. v. Caldine, 278 U. S., l. c. 142, 73 L. Ed., l. c. 232, which involved a collision of trains because Caldine violated a meeting order, it was contended he should have been specially warned of the position of the second train. In the course of the opinion Mr. Justice Holmes said:

> "A failure to stop a man from doing what he knows he ought not to do hardly can be called a cause of his act. Caldine had a plain duty, and he knew it. The message (of warning) would only have given him another motive for obeying the rule that he was bound to obey."

It must be kept in mind that decedent had been warned of the exact movements to be made by the locomotive and the freight car (R. 22, 46). One of the predicates of liability in respondent's principal instruction was the failure to warn decedent by sounding the whistle (R. 148), although the locomotive bell was ringing during the entire switching movement (R. 44, 80).

V.

This record discloses that decedent was guilty of inexcusably gross negligence which alone directly caused his death.

His foreman had told him the particulars of the intended switching movement, not once but three times. He had warned decedent to look out for both the engine and the car, not once but three times (R. 22, 46). The locomotive bell was sounding an additional warning to decedent throughout the entire movement (R. 44, 80). Decedent had no present duty which could have distracted him in any way, as he had no part to play in the actual switching movement (R. 47, 48). He had no duty to perform until the freight car had reached track No. 4 when he was to block it and thereby prevent its rolling back west and fouling the switch point (R. 46, 54). It is clear, therefore, that decedent's duties could not have caused him to forget the warning given him by his foreman.

Nevertheless, despite the warnings given by the foreman, despite the ringing engine bell, despite his knowledge of the details of the movement, decedent unexplainedly

stepped "directly in front of the locomotive tender" (the engine was backing); "stepped over the rail just as the engine hit him" (R. 45). So testified the sole eyewitness to the casualty.

The authorities cited under V in the Summary of Argument hold that under these circumstances decedent was solely responsible for his death.

VI.

Despite the fact that all of the evidence in the trial of this case was produced by witnesses placed upon the stand by respondent, whose testimony was in no way inherently incredible, was uncontradicted and was entirely without display of any hostility towards respondent, her counsel in arguing the case to the jury took the position that his own witnesses were unworthy of belief, and that even though there was no evidence to contradict anything his witnesses had said, the jury should refuse to believe them and base a verdict upon the theory that the actual facts, though not proved, were exactly contrary to those shown in evidence by his own witnesses. In other words, in legal effect, counsel told the jury that the witnesses whom he had placed on the witness stand were not worthy of belief, that their testimony was false, and that although he had no evidence which contradicted them, the jury should base its verdict upon the hypothesis that his witnesses had testified falsely and that the facts were exactly contrary to their testimony (R. 164, 165, 179, 180, 181, 182, 183, 185, 186, 188 and 190).

VII.

Respondent's counsel not only asked the jury to, and the jury did, render a verdict in his favor on the theory that his own witnesses had testified falsely, but he viciously attacked his witnesses, appealed to the passions

and prejudices of the jurors and thereby prevented petitioner from having a fair trial.

He repeatedly charged his own witnesses with false swearing; several times requested the jury not to believe respondent's evidence but to find the facts exactly contrary to her own uncontradicted proof; and warned the jury that they should be extremely careful in accepting the testimony of his own witnesses because they were in appellant's employ (R. 181). P. R. Co. v. Chamberlain, 228 U. S., l. c. 343, 77 L. Ed., l. c. 824.

He misstated the law with respect to the basis for measuring respondent's damages (R. 149). He went entirely outside of the record to tell the jury that he knew why decedent was in the position that he was when he was killed and that decedent was looking for a block to keep the car which was being switched from rolling back and fouling the switch point (R. 186), although there was no evidence to support such a statement.

That the verdict of the jury herein was excessive admits of no possibility of a doubt. The trial judge ordered a remittitur of Ten Thousand Dollars ($10,000.00) because of its excessiveness (R. 195).

The argument of respondent's counsel, standing alone, is amply sufficient to destroy the judgment herein. M. St. P. & S. S. M. R. Co. v. Moquin, 283 U. S. 520, 51 S. Ct. 501, 75 L. Ed. 1243.

Petitioner therefore respectfully urges this Court to issue its writ of certiorari to the Supreme Court of Missouri.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation,
Petitioner,

vs.

GERTRUDE MOONEY, Administratrix of the Estate of Neil P. Mooney, Deceased,
Respondent.

No. 1867. 125

BRIEF FOR RESPONDENT.

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vs.

GERTRUDE MOONEY, Administratrix of the Estate of Neil P. Mooney, Deceased,
Respondent.

No. 1367.

BRIEF FOR RESPONDENT.

STATEMENT.

In addition to the summary statement contained in petitioner's brief (p. 3 et seq.) respondent desires to call the Court's attention to the following facts:

It was the decedent's duty to place himself at the west end of track No. 4, where the switched car would come to rest, in order that he might set the brake or put a block under the wheel so that the car would not run back and foul the tracks (R. 24, 25, 27). This securing of the car must be done the moment the car stops and before it begins running back (R. 124).

It was the practice and custom of the petitioner in making switch movements of the character in question in the Seventh Street yards to withhold starting the movement until every member of the crew had reached his proper place for the execution of the movement (R. 96, 97). As above noted, Mr. Mooney's proper position was at track No. 4, and the movement was started before he reached that place. When he turned southwardly toward the track, after having walked eastwardly, he was opposite his proper position and was on his way there (R. 27). To reach his proper position it was necessary to cross over track No. 5 on which the engine was operating (R. 98, 99).

Petitioner's engineer testified that it was the custom for him to look out for employees as much as possible in making such a movement (R. 75), and that it was his duty to do so (R. 79). At the time the cab of his engine passed the switch at which the foreman was standing he was looking east to see if he had a clear track (R. 66).

One John S. Evens, a former Terminal switchman, testified that the practice and custom of the engineers in making a flying switch was to keep a lookout in the direction the locomotive was moving (R. 95). James T. Walker, a former locomotive engineer, also testified it was customary for the engineer to keep a lookout in the direction his engine was moving and it was unnecessary that he look in the other direction to watch the car that was being switched (R. 136, 137). Petitioner's engineer testified that there had been no change in the customs and practices observed in these switching movements for the past 28 years (R. 80).

Mooney walked eastwardly (R. 27), turned at a point about 10 feet north of the track on which the engine was being operated and walked toward the track without looking back toward the engine (R. 28). The switch foreman then realized that he was going upon the track and

realized Mooney's peril (R. 29, 36, 40). The advancing end of the tender was then about 100 feet from where Mooney was about to cross the tracks (R. 36, 37). It could have been stopped with safety in 25 feet at the speed it was operating (R. 134). In fact, it was stopped in 25 feet after the engineer finally received the emergency signal from the switch foreman (R. 75).

When the switch foreman observed Mr. Mooney's peril he abandoned all thought of throwing the switch and gave his entire attention to calling to Mooney and the engineer and giving emergency stop signals (R. 29, 30). The signals were not seen or heeded by the engineer until after Mooney had been struck. Mr. Mooney approached the track from the engineer's side and was at all times within the engineer's view (R. 28).

SUMMARY OF ARGUMENT.

I.

The decision in this case in no way impairs the uniformity of construction of the Federal Act which makes the carrier liable for any injury to an employee resulting in whole or in part from the negligence of any other of the carrier's agents, servants or employees.

> Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51.

A recovery under the Act by a negligent employee is not limited to the last chance doctrine since the Act itself provides that contributory negligence shall not bar a recovery.

> Federal Employers' Liability Act, 45 U. S. C. A., Sec. 53.

II.

The evidence presented an issue of fact as to whether petitioner's engineer was guilty of negligence proximately contributing to the fatal injury to decedent.

The engineer was under a legal duty to keep a lookout for decedent and by so doing would have discovered him in a perilous position in ample time for the engineer to have stopped the engine or sounded the whistle and thus have saved Mooney. In failing to avert the accident the engineer failed to do what a reasonably prudent person would have done under the circumstances.

> Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 65, 67, 63 S. Ct. 444, 451, 87 L. Ed. 610;
> Norfolk & Western R. Co. v. Earnest, 229 U. S. 114, 118, 33 S. Ct. 654, 57 L. Ed. 1096.

III.

Decedent's conduct may not be regarded as the sole cause of his fatal injury.

(1) If Mooney was negligent and his negligence continued to the instant of the injury, this would not relieve petitioner of liability for the engineer's negligence. The Act itself makes no exception where contributory negligence is concurrent in point of time with that of the carrier.

Union Pacific R. Co. v. Hadley, Admr., 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751.

(2) Neither the fact that the engine bell was ringing throughout the movement nor the fact that Mooney had been thrice instructed by the foreman as to the movement to be made relieved the engineer from the performance of the legal duty owing to Mooney. Decedent had the right to rely upon the observance of the customary practice of withholding the movement until he had crossed over the tracks and reached his place at track No. 4 for the performance of his duty of blocking the car.

Owens v. Union Pacific R. Co., 319 U. S. 715, 63 S. Ct. 1271, 1273, 87 L. Ed. 1683;
Dir. Gen. v. Templin, 268 Fed. 483;
St. Louis-San Francisco Ry. Co. v. Jeffries, 276 Fed. 73, 75;
Wyatt v. N. Y. O. & W. R. Co., 45 F. (2d) 705, 707.

(3) Mooney's failure to discover the engine was at most contributory negligence.

Owens v. Union Pacific R. Co., supra;
Rocco v. Lehigh Valley R. Co., 288 U. S. 275, 279, 53 S. Ct. 343, 77 L. Ed. 743.

IV.

Respondent was not bound by the testimony of the engineer that he did not see decedent nor by the testimony of the foreman that he instructed decedent as to the movement because:

(1) A party is not concluded by the testimony of his witness where there is other testimony from which a contrary inference may legitimately be drawn.

32 C. J. S., p. 1104, Sec. 1040;
Gibson v. Sou. Pac. Co., 67 F. (2d) 758.

(2) The jury could well have found that the instructions to Mooney were not equivalent to informing him that the usual custom of withholding the movement until he reached his position would be violated.

Emanual v. Kansas City Title & Trust Co., 127 F. (2d) 175, l. c. 180.

(3) The testimony of the engineer that he failed to see what was plainly within his view while he was under a duty to keep a lookout and failed to see what the switch foreman, in the same position, saw and appreciated is wholely unbelievable.

Bash v. B. & O. R. Co., 102 F. (2d) 48.

V.

The complaint as to the argument of respondent's counsel may not be considered by this Court because:

(1) The point involves no construction of the Federal Act and the decision rests upon an independent ground of state jurisdiction sufficient to support the judgment.

Central Vermont R. Co. v. White, 238 U. S. 507, 509, 35 S. Ct. 865, 59 L. Ed. 1433.

(2) Whether a verdict is brought about by improper argument is a matter resting within the discretion of the Trial Court. The Trial Court in this case held there was no prejudicial effect and the Supreme Court found there was no abuse of discretion.

Fairmount Glass Works v. Coal Co., 287 U. S. 474, 485, 53 S. Ct. 255, 77 L. Ed. 445.

(3) The statement of respondent's counsel in the argument that Mooney would earn so much during his life expectancy (R. 191) furnishes no ground of complaint because:

(a) The instructions (R. 153) limited the award to the present cash value of the pecuniary loss.

(b) The jury did not award the total earnings.

ARGUMENT.

I.

The Decision in This Case Does Not Impair the Uniformity of Construction of the Federal Act.

Petitioner urges that the Court below based its decision upon the humanitarian doctrine—a doctrine peculiar to the State of Missouri. Counsel argues that this Court recognizes only the last chance doctrine, which is concededly more limited than the humanitarian rule. We shall point out hereafter in this brief that the conduct of petitioner's engineer amountd to negligence, as defined and applied by this Court and other Federal Courts. The fact that the evidence in the present record fits the pattern of the Missouri humanitarian doctrine is merely a coincidence.

There is no necessity of considering the refinements of the last chance doctrine. It was not invoked in the present case, respondent did not limit her case to that kind of negligence, and the Employers' Liability Act does not so limit her rights. The last chance and humanitarian doctrines are resorted to to permit recovery by negligent plaintiffs in those cases in which contributory negligence would otherwise defeat the actions. But the Act itself, 45 U. S. C. A., Section 53, eliminates contributory negligence as a defense in bar and substitutes the rule of comparative negligence, making the negligence of the injured person available to the carrier only in diminution of damages.

The Federal Act, 45 U. S. C. A., Section 51, makes the carrier liable for any injury to an employee which results "in whole or in part" from the negligence of any other of its agents or employees. The sole question for consideration in the instant case is whether the evidence presented an issue of fact as to whether petitioner's engineer was

guilty of negligence proximately contributing to the death of Mooney. It is of no consequence that the negligence submitted embraces counterparts of the Missouri humanitarian doctrine. The rule of uniformity is in no way impaired by that fact if the evidence also makes a case of negligence as defined and applied by this Court. This, as we construe it, was the view of the Court below. The Court found the evidence did make a case under the decisions of this Court and, in so holding, we submit the Court was undoubtedly correct.

II.

The Evidence Made a Case of Negligence on the Part of Petitioner's Engineer.

The vital question to be determined is: Was the evidence sufficient to permit the jury to find with propriety that petitioner's engineer was guilty of negligence proximately contributing to decedent's fatal injuries? An affirmative answer to this question establishes liability.

The factual situation may be briefly summarized. There was a long standing, uniform custom requiring petitioner's engineers, in making flying switch movements, to keep a lookout in the direction the engine is moving so as to discover any persons, including employees, either on or within dangerous proximity to the track (R. 94, 95). Mooney walked eastwardly with his back to the locomotive, in plain view of the engineer, and then turned southwardly on his way to track No. 4 where his duties required him to be at the moment the switched car came to rest on that track. After turning southwardly, decedent, without looking toward the engine, walked steadily to and upon the track. At that time the switch foreman saw and realized that Mooney was going upon the track and that he would be struck unless the engine were stopped. So apparent and impending was the peril that the fore-

man disregarded all thought of lining the switch to shunt the car onto track No. 4 and gave his entire attention to calling and giving emergency stop signals, which were unseen or unheeded by the engineer (R. 29, 30). At the time Mooney's peril became apparent the advancing end of the locomotive tender was approximately 100 feet from the point where Mooney was approaching the track and could have been stopped in 25 or 30 feet (R. 134). The brakes were not applied until after Mooney had been struck, and no whistle was sounded at any time. As the engineer, sitting in his cab, was passing the switch (162 feet from where Mooney was injured) (R. 32), the engineer was looking east and had an unobstructed view. There was evidence of a well defined custom of the engineers to sound a whistle if any employees were seen on or about to go upon the tracks (R. 80).

The Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51, provides that every common carrier by railroad engaged in interstate commerce shall be liable in damages to any person suffering injury while employed by it in, or in furtherance of or substantially affecting such commerce (or to his personal representative if the injury proves fatal), for such injury or death resulting in whole or in part from the negligence of the carrier, its officers, agents, or employees. The Act does not define negligence, but this Court has defined it as:

> "the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done."
>
> Tiller v. Atlantic Coast Line R. Co., 63 S. Ct. 444, 451, 318 U. S. 54, 65-67, 87 L. Ed. 618.

In view of the long standing custom to look out for switchmen a duty was enjoined upon the engineer to keep

such lookout. He could not close his eyes and be heard to say that he did not see the decedent, but must be held to have seen what, by looking, he could have seen. There was a long standing custom to withhold the flying switch movement until the fieldman (Mooney) had reached his place of duty. To reach this place he necessarily must cross the track upon which the engine would be operated, so the engineer had no right to expect a clear track.

Not only was the engineer duty bound to keep a lookout by reason of the custom but the very situation here demanded that he do so. He knew that Mooney or some member of the crew would be obliged to cross the track so as to be in a position to block the car on track No. 4 (R. 87). The evidence shows no necessity for the engineer looking in any other direction except to the east as his engine proceeded to and upon the cross-over track. He must have anticipated that the fieldman (Mooney) would at some moment before the engine reached there cross over to track No. 4.

In Norfolk & Western R. Co. v. Earnest, 229 U. S. 114, l. c. 118, this Court said:

> "As before indicated, there was evidence tending to show that it was usual for the pilot to walk between the rails in advance of the locomotive, that the conditions outside the track made it necessary to do so in the nighttime, and that all this was known to the engineer. Whether the evidence was true was for the jury to determine, and if it was true it certainly could not be said as matter of law that the engineer was in the exercise of ordinary care, which was the controlling standard for him, if he made no effort to see whether the plaintiff was on the track and took no precautions for his protection."

In the case at bar the accident happened in broad daylight. Decedent approached the track from the engineer's

side. The engineer's view was unobstructed. The foreman saw and realized Mooney's peril when the advancing end of the locomotive tender was yet 100 feet away from Mooney. The engine could have been stopped in 25 or 30 feet. The foreman gave emergency stop signals and shouted, but his signals were unseen or unheeded by the engineer and the brakes were not applied until after Mooney had been struck. We think it clear from these facts that petitioner's engineer failed to exercise ordinary care and that his failure proximately contributed to Mooney's death.

III.

Decedent's Conduct Was Not the Sole Cause.

Learned counsel for petitioner lays stress upon the claim that Mooney's negligence continued to the instant of the injury. Incidentally, petitioner pleaded no contributory negligence and this issue was not in the case for any purpose. Petitioner argues, however, that Mooney was negligent and that, having continued to the instant of the injury, petitioner is somehow relieved of liability and Mooney's conduct must be considered the sole cause of his death. But the Act itself, 45 U. S. C. A., Section 53, provides that contributory negligence shall not bar a recovery. There is no suggestion in this Act that negligence concurrent in point of time could do any more than diminish the damages. Certainly this Court has never read any such exception into the Act and a recovery has never been denied where there was actionable, causal negligence on the part of any other of the carrier's employees.

In Union Pacific R. Co. v. Hadley, Admr., 246 U. S. 330, a brakeman named Cradit lost his life while in the caboose of his train, which had been stopped upon a single track. Another train approaching from the rear crashed into the caboose, inflicting fatal injuries to Cradit. It was his

duty to leave the caboose, walk back along the track and flag approaching trains. Concededly he failed in this duty, and the railroad company urged that his negligence in so failing was the sole efficient cause of his death. It appeared, however, that the crew of the following train was negligent in running against the signals and the dispatcher was remiss in permitting the second train to proceed to the point of collision. This Court said:

> "But it is said that, in any view of the defendant's conduct, the only proximate cause of Cradit's death was his own neglect of duty. But if the railroad company was negligent, it was negligent at the very moment of its final act. It ran one train into another when, if it had done its duty, neither train would have been at that place. Its conduct was as near to the result as that of Cradit's. We do not mean that the negligence of Cradit was not contributory. We must look at the situation as a practical unit rather than inquire into a purely logical priority. But, even if Cradit's negligence should be deemed the logical last, it would be emptying the statute of its meaning to say that his death did not 'result in part from the negligence of any of the employees' of the road."

Conceding (without admitting) that Mooney was negligent and that his negligence continued to the very moment of his injury, it must be observed also that the negligence of petitioner's engineer continued to operate as an efficient cause of Mooney's death until the very same moment.

Neither the fact that the engine bell was ringing throughout the movement nor the fact that Mooney had been thrice instructed by the foreman of the movement that was to be made can relieve the petitioner of liability for the violation by its engineer of the legal duty owing to Mooney. Decedent had the right to rely and presumably did rely on the custom to withhold the movement until he had reached the place on track No. 4 for the per-

formance of his duty. St. L. S. F. Ry. Co. v. Jeffries, 276 F., l. c. 75. When the foreman instructed Mooney as to the movement he also instructed him to procure a block and secure the car when it reached its place on track No. 4. The instruction as to the intended movement was not equivalent to warning him that the usual practice of withholding the movement would be violated. While the evidence shows that the bell was ringing throughout the movement (R. 48, 84), it does not appear the bell was started as the engine was about to move. So it cannot be said that it was a sufficient warning to Mooney of the close and dangerous proximity of the engine even had he heard the bell, and it is a fair inference that he did not hear it. But, if we give to the three warnings the import claimed by petitioner, Mooney's disregard of the warnings or his failure to hear or heed the bell was at most only contributory negligence.

In Owens v. Union Pacific R. Co., 319 U. S. 715, 63 S. Ct. 1271, 1273, Owens was fatally injured when run over by cars that were being "kicked" by his crew, of which he was the foreman. Owens himself gave the order to Koefod, a member of the crew, to "let these cars go 13." There was evidence it was customary to delay the switching movement until an employee in Koefod's position would see that the man at the switch (Owens) was out of harm's way and to wait until Owens had signaled for the movement. After having set the switch Owens began to walk across the track to the north side. No evidence was available or introduced to show his reason for doing so. Since he was looking northwardly he did not see the kicked cars until too late. This Court said, 63 S. Ct. 1273:

> "If this were all the evidence, the case would be clearly one in which the jury might find there was negligence on the part of Koefod or the engineer, or both, and that Owens' conduct amounted to no more than contributory ngligence, if it was that."

Such cases as Unadilla Valley R. Co. v. Caldine, 278 U. S. 139, cited by petitioner (p. 26 of petitioner's brief) do not support the argument that any negligence of the injured employee, however gross, may necessarily be the sole cause of his injury. In those cases there was no negligence attributable to any other employee of the carrier. The distinction was stated by this Court in Rocco v. Lehigh Valley R. Co., 288 U. S. 275, 53 S. Ct. 343, 77 L. Ed. 743. After referring to the Caldine and other similar decisions, this Court said, 288 U. S., l. c. 279:

> "In none was there any negligence on the part of employees operating the train moving in the opposite direction."

IV.

Respondent Is Not Concluded by the Testimony.

Petitioner says respondent is bound by the testimony of its employees whom she was forced to call as witnesses in her behalf. We understand the rule to be that a litigant is bound by the testimony of his witnesses upon a given issue if there is no other testimony from which a contrary inference may reasonably be drawn. Two matters are stressed by petitioner. The first—the testimony of the foreman that he thrice instructed Mooney about the contemplated movement—has been discussed heretofore in this argument. Not only was Mooney instructed as to the movement, but he was also instructed by the foreman to obtain a block and secure the car when it reached its place on track No. 4. It was customary to withhold the movement until Mooney had reached that place. Therefore, reasonable minds could well conclude that the instructions were not intended to and could not be interpreted as notice to Mooney that the usual custom would be violated. He was, therefore, entitled to the protection of a lookout being kept by the engineer, and was entitled to a warning of the dangerous approach of the engine.

The second matter—the testimony of the engineer that he did not see Mooney—avails the petitioner nothing. The actual discovery of peril is not a condition precedent to liability. Moreover, the undisputed facts that the engineer was looking to the east and had an unobstructed view render his testimony that he did not see Mooney wholly unbelievable. He was bound to see and appreciate what the foreman, in substantially the same position, saw and appreciated.

V.

Argument of Counsel.

This Court is without jurisdiction to consider the complaint of alleged prejudicial argument to the jury. The point involves no construction of the Federal Act. Whether the argument was prejudicial was within the discretion of the Trial Judge. The Supreme Court of Missouri held there was no abuse of discretion. Its decision in this respect rests upon an independent ground of state jurisdiction sufficient to support the judgment, and in this situation certiorari will not be granted.

In Central Vermont Ry. Co. v. White, 238 U. S. 507, 35 S. Ct. 865, 59 L. Ed. 1433, this Court said, 238 U. S., l. c. 509:

> "Some of the assignments in the present case relate to matters of pleading; others to the admissibility of evidence, to the sufficiency of exceptions and to various rulings of the trial court which involve no construction of the Employers' Liability Act and which, therefore, cannot be considered on writ of error from a state court."

In leaving such matters to the discretion of the Trial Court the practice of the Federal Courts is the same as that of the Missouri Courts.

In Fairmount Glass Works v. Coal Co., 287 U. S. 474, 77 L. Ed. 445, 53 S. Ct. 255, this Court said, 287 U. S., l. c. 485:

> "Appellate Courts should be slow to impute to juries a disregard of their duties and to Trial Courts a want of diligence or perspicacity in appraising the jury's conduct. * * *
>
> "It is urged that the refusal to set aside the verdict was an abuse of the Trial Court's discretion and hence reviewable. The Court of Appeals has not declared that the Trial Judge abused his discretion."

So in the instant case the Trial Judge in overruling petitioner's motion for a new trial necessarily found that the verdict was not the result of prejudicial argument, and the Supreme Court held that the Trial Court did not abuse its discretion. The case, therefore, is not like Minneapolis etc. Ry. Co. v. Moquin, 283 U. S. 520, relied on by petitioner. In that case the Supreme Court of Minnesota specifically found:

> "From the entire record before us we are of the opinion that the verdict is excessive because of passion and prejudice" (283 U. S., l. c. 521).

A new trial was ordered unless a remittitur of a portion of the judgment was made. It may be conceded that, in a case under the Federal Act, a verdict found to be the result of passion and prejudice cannot be cured by remittitur. That is not the situation pertaining in the case at bar. Here the Trial Judge ordered a remittitur because he thought the jury had erred in calculating the present cash value of the pecuniary loss to the widow and minor children.

There is no merit to petitioner's point that respondent's counsel induced the jury to award respondent the total earnings of decedent. The instruction of the Court

on the measure of damages (R. 153) limited the award to the present cash value of the pecuniary loss. The total earnings of decedent of $2400.00 per year for his life expectancy of thirty-five years would be $84,000.00, so it conclusively appears that the jury were not influenced by counsel's argument.

CONCLUSION.

It is respectfully submitted that the decision of the Court below is in complete harmony with the decisions of this Court and the lower Federal Courts; that the evidence met the test of negligence and proximate cause as laid down by this Court in decisions construing the Act, and that, therefore, the writ prayed for herein should be denied.

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